U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0334 BLA

HERBERT F. STACY, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STONEY GAP COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 02/28/2018
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Herbert F. Stacy, Jr., Big Stone Gap, Virginia.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2015-BLA-5598) of Administrative Law Judge Drew A. Swank rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on December 23, 2013.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] the administrative law judge credited claimant with at least fifteen years of underground coal mine employment, but found that the evidence did not establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), or establish entitlement to benefits under 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the issue is whether the Decision and Order below is supported by substantial evidence. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86-87 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[3] 33 U.S.C. §921(b)(3), as

[1] Judy Hamblin, a support technician with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Hamblin is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP,* 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Invocation of the Section 411(c)(4) Presumption – Total Disability

The regulations provide that a miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies showing values equal to or less than those listed in Appendix B to 20 C.F.R Part 718; 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C to 20 C.F.R. Part 718; 3) medical evidence showing that the miner has pneumoconiosis and cor pulmonale with right-sided congestive heart failure; or 4) the opinion of a physician who, exercising reasoned medical judgment, concludes that a miner's respiratory or pulmonary condition is totally disabling, based on medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. §718.204(b)(2)(i)-(iv).

The administrative law judge correctly found that claimant was unable to establish total disability at 20 C.F.R. §718.204(b)(2)(i), as there are no qualifying[4] pulmonary function studies of record.[5] Decision and Order at 10.

[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] We disagree with the administrative law judge's logic and his bright-line-rule that discrepancies in reported heights on the pulmonary function studies must be resolved by selecting the shortest measurement of claimant's height. Decision and Order at 9 n.11. Any error is harmless in this instance, however, as none of claimant's pulmonary function studies would yield qualifying values even if the administrative law judge had used the tallest measurement of claimant's height. *See Larioni v. Director, OWCP*, 6

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered the results of two resting blood gas studies, dated January 27, 2014 and May 14, 2015. Decision and Order at 10-11. The January 27, 2014 study administered by Dr. Habre yielded qualifying values, while the May 14, 2015 study conducted by Dr. Rosenberg yielded non-qualifying values. Director's Exhibit 11; Employer's Exhibit 4. The administrative law judge permissibly found that the non-qualifying May 14, 2015 blood gas study is more probative of claimant's current condition because it is the most recent study of record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530, 21 BLR 2-323, 2-330 (4th Cir. 1998); *Schetroma v. Director, OWCP*, 18 BLR 1-17, 1-22 (1993); Decision and Order at 11. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the blood gas study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

The administrative law judge correctly found that claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii), as there is no evidence in the record indicating that claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 11.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinion of Dr. Ajjarapu[6] that claimant is totally disabled and the opinions of Drs. Rosenberg and Castle that claimant is not totally disabled from a pulmonary perspective, together with claimant's medical records. Decision and Order at 12-15; Director's Exhibits 11, 12; Claimant's Exhibits 4, 5; Employer's Exhibits 4, 5, 6, 7, 11, 12.

The administrative law judge correctly noted that in support of her opinion that claimant has a totally disabling pulmonary impairment, Dr. Ajjarapu stated that claimant "has severe pulmonary impairment based on spirometry and has severe hypoxemia based on the arterial blood gas values." Director's Exhibit 11; *see* Decision and Order at 12. The administrative law judge further correctly noted, however, that in her own summary of the diagnostic testing, Dr. Ajjarapu stated that the pulmonary function studies showed

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BLR 1-1276, 1-1278 (1984); Director's Exhibits 11, 13; Claimant's Exhibit 3; Employer's Exhibit 4.

[6] Dr. Ajjarapu examined claimant on behalf of the Department of Labor. Director's Exhibit 11. Relying on Dr. Habre's medical testing of January 27, 2014, Dr. Ajjarapu opined that her overall evaluation shows total and complete pulmonary impairment. *Id*. She concluded that claimant would not be able to perform his previous coal mine employment. *Id*.

a "moderate pulmonary impairment" and the blood gas testing showed "moderate hypoxemia." Director's Exhibit 11; *see* Decision and Order at 12. In light of this unexplained discrepancy, the administrative law judge permissibly discounted Dr. Ajjarapu's opinion as not well-reasoned or documented. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; Decision and Order at 12; Director's Exhibit 11. Moreover, the administrative law judge noted that Dr. Ajjarapu did not review the other objective evidence of record, but based her opinion on the limited medical data from a single examination. *See Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); Decision and Order at 14.

Finally, the administrative law judge considered claimant's hospitalization and treatment records, which list various medical problems but do not contain an opinion regarding the level of claimant's pulmonary disability. Decision and Order at 15. The administrative law judge correctly noted that the recorded complaints of shortness of breath are insufficient, by themselves, to establish a disabling pulmonary impairment. *See Clay v. Director, OWCP*, 7 BLR 1-82 (1984); Decision and Order at 15; Claimant's Exhibits 5, 6.

It is the province of the administrative law judge to evaluate the medical evidence, draw inferences, and assess probative value. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Because the administrative law judge provided a valid basis for according diminished weight to Dr. Ajjarapu's opinion, the only opinion supportive of claimant's burden, *see Kozele v. Rochester & Pittsburgh Coal Co*., 6 BLR 1-378, 1-382-83 n.4 (1983), we affirm the administrative law judge's finding that the evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

We also affirm, as supported by substantial evidence, the administrative law judge's finding that the weight of the evidence, like and unlike, fails to establish total respiratory or pulmonary disability. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc); Decision and Order at 15. Consequently, we affirm the administrative law judge's findings that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2), and did not invoke the Section 411(c)(4) presumption. As claimant has failed to prove an essential element of entitlement pursuant to 20 C.F.R. Part 718, an award of benefits is precluded. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge